

Regarding the Information Disclosure Statement of June 22, 2009, the fee set forth in 37 CFR 1.17(p) must be charged to Deposit Account No. 03-1728 because the correction date occurred after the first action on the merits (of January 21, 2009). Reference is made to MPEP § 609.05(a).

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 7, 19, 20, 28, 29, and 31-33 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Fleischmann et al., US 6,375,682 B1. Figures 1b, 2b, and 3, for example, illustrate top and bottom plates 12 and a core having curved surfaces defined by ball bearing members 44 and inner surfaces of radial bearing 24 (Figure 1c). The top and bottom plates have curved sections at the annular grooves 48 and at the hubs affixed by screws 50. The annular intermediate body, comprising the bellows 26 and the plate 32, provides elastic cushioning for the prosthesis (Figure 3; column 4, lines 50-58; column 7, lines 24-49; column 8, lines 5-10; etc.). The prosthesis can be configured to replace a natural vertebral disc (column 6, lines 6-9;

column 3, lines 31-32; etc.). Regarding claim 32, the upper and lower bodies can alternatively be equated with *only* the thrust bearing members **22** (and ball bearing members **44**), which do not extend into the bore of said elastic annular intermediate body.

Claims 8 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Fleischmann et al., US 6,375,682 B1. Regarding claim 8, the plate and teeth configurations were well known in the art at the time of the present invention and would have been an obvious variant on or supplement to the spikes **20** shown in Fleischmann et al., with further motivation having been provided by the discussion at column 6, line 53, through column 7, line 8. Regarding claim 14, a mandrel would have been obvious in order to impose limits on the extent of relative rotations, with the ordinary practitioner having been impelled by the expressed need to reduce or eliminate the potential for damage to the spinal cord (column 4, lines 53-57) and other tissue.

Claims 15, 16, and 34 are allowed.

The Applicant's remarks have been considered. In the examiner's view the "angular positions" (e.g., amended claim 7, line 19) are inadequately defined and render the scope to be quite broad. For example, the elongated dimension of the vertebra engaging member (or top plate) **72** as illustrated in Figure 4a defines a continuum of acute and obtuse angles with a central axis of the core during relative rotation (Fleischmann et al.: column 5, lines 1-25) in a tilted configuration (Figure 3). Likewise, "sliding movement" (e.g., amended claim 7, line 18) is vague or broad in that the vertebral engaging members are *capable* (whether or not such was the intended use) of sliding along slippery and/or flaccid external members (as opposed to healthy

vertebrae properly engaged) during bending of the bellows (Fleischmann et al.: column 7, lines 46-47) and/or during said relative rotation.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Dave Willse, whose telephone number is 571-272-4762 and who is generally available Monday, Tuesday, and Thursday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine McDermott, can be reached on 571-272-4754. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

**/David H. Willse/
Primary Examiner
Art Unit 3738**